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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

HEROES CLUB, INC., a California Corporation,

Plaintiff,

v.

UNITED PARCEL SERVICE, INC., and DOES 1-50,

Defendants.

Case No. 07-4422 JCS

DEFENDANT UNITED PARCEL SERVICE, INC.'S NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: December 14, 2007
Time: 9:30 a.m.
Courtroom: A

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 14, 2007 at 9:30 a.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable Joseph C. Spero, United States District Court, Courtroom A, 15th Floor, 450 Golden Gate Ave., San Francisco, California 94102, Defendant United Parcel Service, Inc. ("UPS") will and hereby does move this Court, pursuant to Federal Rule of Civil Procedure 12(c), to enter judgment for UPS as a matter of law.

UPS moves for judgment on the pleadings on the following bases: First, Plaintiff Heroes Club, Inc.'s claims are related to UPS's prices and services and, except for a routine breach of contract claim, are preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), 49 U.S.C. §§ 14501(c)(1) and 41713(b)(4). Second, to the extent a routine breach of contract claim by Plaintiff is based on packages delivered before January 27, 2006, Plaintiff's claim is barred by the 18-month statute of limitations that federal law imposes on claims against package carriers for alleged overcharges. *See Emmert Indus. Corp. v. Artisan Assocs., Inc.*, 497 F.3d 982 (9th Cir. 2007). Finally, Plaintiff fails to allege that it fulfilled contractual and statutory conditions precedent to recovery, which bars any surviving breach of contract claim. Accordingly, UPS respectfully requests this Court to enter judgment for UPS as a matter of law.

This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Annemarie C. O'Shea and accompanying Exhibits (filed herewith), all pleadings and papers on file in this action, and such other written and oral argument as may be presented to the Court.

Dated: November 9, 2007

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MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF ISSUES

1. Whether the Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. §§ 14501(c)(1) and 41713(b)(4), which bars any state from enforcing any law "related to a price, route, or service" of any motor, air, or intermodal air/ground carrier, preempts all of Plaintiff's claims and requested relief, except a routine breach of contract claim seeking recovery solely to enforce UPS's self-imposed, contractual undertakings with no enlargement or enhancement based on state laws or policies external to the parties' agreement.

2. Whether Plaintiff's claims alleged to have occurred before January 27, 2006, are barred under 49 U.S.C. § 14705(b), which requires that all claims "to recover overcharges" by a carrier be brought "within 18 months after the claim accrues."

3. Whether Plaintiff's shipping contract and 49 U.S.C. § 13710(a)(3)(B) — both of which require a shipper to contest a shipping charge in writing within 180 days of receiving a bill in order to have the right to bring a claim against the carrier — bar Plaintiff's claims.

INTRODUCTION

In this putative class action, Plaintiff Heroes Club, Inc. ("Plaintiff") alleges that it paid for, but did not receive, certain shipping services from United Parcel Service, Inc. ("UPS") during the four years in which it had a UPS shipping account. Plaintiff alleges that, pursuant to its shipping contract with UPS, it requested and paid for UPS to obtain a signature on delivery of Plaintiff's packages but UPS failed to do so for approximately half the shipments, and failed to refund to Plaintiff the additional charge for the delivery signature service. Plaintiff contends that UPS is liable to Plaintiff and other members of the purported class for breach of contract, fraud, negligent misrepresentation, and violation of California's unfair competition and false advertising statutes, Business and Professions Code sections 17200 and 17500, *et seq*.

UPS is entitled to judgment in its favor on all of Plaintiff's claims.

First, the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") expressly preempts all of Plaintiff's claims, except for a routine breach of contract claim seeking only compensatory damages. The FAAAA precludes enforcement of any state law "related to a price, route, or service of any motor carrier." 49 U.S.C. § 14501(c)(1); *see also* 49 U.S.C. § 41713(b)(4)(A). Plaintiff's claims for equitable relief fall within this prohibited territory because they directly relate to the services that UPS provided in delivering Plaintiff's and putative class members' packages, and the prices charged for those services. Plaintiff's claims are directly contrary to the Congressional mandate and explicit Supreme Court authority providing that transportation of property is governed exclusively by federal law. The only cause of action that can survive FAAAA preemption is a routine breach of contract claim seeking solely to enforce UPS's self-imposed undertakings with no enlargement or enhancement based on state laws or policies external to the parties' agreement. To the extent that Plaintiff seeks declaratory relief, punitive damages, to void its contracts, or to enlarge or enhance its claims based upon state laws or policies external to its UPS shipping agreement, the FAAAA preempts Plaintiff's contract claim as well.

Second, Plaintiff's breach of contract claims based on alleged overcharges occurring before January 27, 2006, are time-barred. Under 49 U.S.C. § 14705(b), any shipper seeking to

recover charges must bring an action within *18 months* after the claim accrues. The Ninth Circuit recently confirmed that § 14705 bars breach of contract claims to recover charges that accrued prior to the 18-month limitations period. *See Emmert Indus. Corp. v. Artisan Assocs., Inc.*, 497 F.3d 982, 989-90 (9th Cir. 2007). To the extent Plaintiff seeks recovery for claims accruing before January 27, 2006 — the date 18 months prior to the filing of the Complaint — those claims are time-barred and should be dismissed with prejudice.

Third, to the extent any claims are not otherwise barred, UPS is entitled to judgment because Plaintiff failed to allege compliance with contractual and statutory notice requirements. The shipping contract required shippers (like Plaintiff here) to notify UPS of any disputed invoice within 180 days of receiving the contested invoice, or the dispute is waived. Federal law imposes the same requirement: Under 49 U.S.C. § 13710(a)(3)(B), shippers must dispute charges within 180 days of receiving a contested invoice as a precondition to bringing suit. Moreover, since 2005, Plaintiff's contracts with UPS expressly have obligated Plaintiff to plead satisfaction of the notice requirement as a contractual condition precedent to recovery on any complaint against UPS arising from a disputed invoice, which Plaintiff has not done.

Accordingly, for the reasons set forth below, all of Plaintiff's claims should be dismissed and UPS is entitled to judgment as a matter of law.

BACKGROUND

I. PLAINTIFF'S CONTRACTS WITH UPS.

A. The Shipping Contracts.

Plaintiff alleges that, beginning in July 2003, it had a shipping account with UPS and entered into agreements with UPS for transportation services. (Compl. ¶¶ 15, 38-40.) To obtain the shipping services, UPS provided Plaintiff with a "Shipping Record Book," which contained shipping records to be completed by Plaintiff to obtain services for each specific package to be shipped via UPS, including a service by which UPS would obtain a signature on delivery of a package for an additional fee. (*Id.* ¶¶ 39, 42.) The terms and conditions of the shipping contract are set forth in the shipping record, and in the UPS Rate and Service Guide, each of which incorporates the terms of the UPS Tariff. *See Kesel v. United Parcel Serv., Inc.*, 339 F.3d 849, 852 (9th Cir. 2003) (noting that "UPS's shipping agreement with [plaintiff] comprised the air waybill . . ., the Guide to UPS Services . . ., and UPS's General Tariff"); *State Collections, Inc. v. United Parcel Serv., Inc.*, No. C 01-00707 CAL ARB, 2001 U.S. Dist. LEXIS 4865, at *2-3 (N.D. Cal. Apr. 12, 2001) ("It is well established that the shipping documents . . ., the UPS Tariff, and the Guide to UPS Services are part of the contract between UPS and the shipper. . . . Indeed, the terms of these contract documents are binding on a shipper even if a shipper is not aware of them.") (citations omitted); s*ee also* These contract documents — the UPS shipping records, the UPS Tariff, and the UPS Rate and Service Guide — are collectively referred to as the "UPS Shipping Contract."[1]

B. The Shipping Contract Notice and Dispute Provisions.

Under the UPS Shipping Contract, a shipper is required to notify UPS of any disputed shipping charges within 180 days of receiving a contested invoice, or the billing dispute is waived. (Ex. A (2007) at 3; Ex. B (2006) at 6, 9, 14, 16; Ex. C (2005) at 20, 24, 28, 32, 35; Ex. D (2004) at 41, 43, 47; Ex. E (2003) at 51, 54, 57.) This notice provision is an express condition

[1] Relevant excerpts of the UPS Rate and Service Guide and UPS Tariff in effect for the period 2003-2007 are attached as exhibits to the Declaration of Annemarie O'Shea.

precedent to Plaintiff's recovery for any disputed invoice. (Ex. A at 4); *see Barber Auto Sales, Inc. v. United Parcel Serv., Inc.*, 494 F. Supp. 2d 1290, 1295-96 (N.D. Ala. 2007). In addition, federal law imposes the same 180-day notice requirement as a condition precedent to recovery. *See* 49 U.S.C. § 13710(a)(3)(B).

While pleading satisfaction of conditions precedent has long been a requirement under Rule 9(c) of the Federal Rules of Civil Procedure, since 2005, UPS's Shipping Contract also has provided that any complaint against UPS arising from a disputed invoice must expressly plead that Plaintiff notified UPS of the dispute within 180 days of receiving the invoice. (Ex. A at 4; Ex. B at 10, 16; Ex. C at 14, 29, 33, 37 ("All claims against UPS arising from or related to the provision of services by UPS . . . shall be extinguished unless the shipper . . . pleads on the face of any complaint filed against UPS satisfaction and compliance with those notice and claims periods as a contractual condition precedent to recovery.").) *See also Barber Auto*, 494 F. Supp. 2d at 1292. The failure to comply with the notice and pleading provision bars any claims Plaintiff may bring arising from a disputed invoice, and the failure to plead compliance results in dismissal of the Complaint.

II. ALLEGATIONS OF THE COMPLAINT.

The Complaint alleges that UPS provides shipping and related services in California and elsewhere, "including but not limited to the service for an additional fee, of providing delivery confirmation with the signature of the person to whom a package is delivered."[2] (Compl. ¶¶ 3, 14.) According to the Complaint, "UPS has charged and continues to charge an additional fee over and above the cost of shipping" for this service. (*Id.* ¶ 16.) Plaintiff alleges that it selected the delivery confirmation signature service, that UPS charged and collected this additional fee from Plaintiff, and that UPS "retained that fee" even when UPS allegedly failed to obtain the signature of addressees. (*Id.* ¶¶ 17, 19, 43.) The Complaint does not identify any specific

[2] Solely for purposes of this motion, UPS accepts as true the well-pleaded factual allegations contained in the Complaint. *See, e.g., Cahill v. Liberty Mutual Ins.,* 80 F.3d 336, 337-38 (9th Cir. 1996) (allegations of material fact are taken as true and construed in the light favorable to the nonmoving party in ruling on motion to dismiss).

deliveries for which Plaintiff claims it did not receive this service. Plaintiff nonetheless alleges that UPS "breached its agreement with Plaintiff" by failing to obtain delivery confirmation signatures when Plaintiff had opted for this service "by so indicating on the Shipping Record." (*Id.* ¶¶ 40-42.)

Plaintiff seeks to represent a putative class of "business entities in California" who, since July 2003, "paid UPS a separate fee for obtaining the signature of the person to whom the package is delivered." (*Id.* ¶ 7.) Plaintiff alleges that UPS is liable to Plaintiff and the purported class for compensatory damages, including "the amounts paid by them for the service," and punitive damages. (*Id.* ¶¶ 32-33, 36, 45.) Plaintiff also seeks restitution of "all fees paid for the service," injunctive relief, and attorneys' fees. (*Id.* ¶¶ 52-54, 63-69, & p. 15.)

STANDARD FOR JUDGMENT ON THE PLEADINGS

Judgment on the pleadings is properly granted "when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.,* 896 F.2d 1542, 1550 (9th Cir. 1989); *see also* Fed. R. Civ. P. 12(c).

In ruling on this motion, this Court may properly consider the UPS Shipping Contract. (*See* Compl. ¶¶ 15, 38-44). Where, as here, a claim arises from a contract, "this Court may properly consider documents; such as the UPS Tariff and the Guide to UPS Services, which contain material terms of the contract at issue, but are not attached to the complaint." *State Collections*, 2001 U.S. Dist. LEXIS 4865, at *3 (granting defendant's motion to dismiss).[3]

[3] This Court can consider the terms set forth in the shipping contract in ruling on this motion because Plaintiff relies on them, they are referred to in the Complaint, and their authenticity is not questioned. *See Branch v. Tunnell,* 14 F.3d 449, 454 (9th Cir. 1994), *rev'd in part on other grounds*, 32 Fed. Appx. 213 (9th Cir. 2002) (district court ruling on motion to dismiss may consider documents whose contents are alleged in the complaint, whose authenticity no party questions, but which are not physically attached to the complaint); *see also Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1141 n.5 (9th Cir. 2003) (a district court may properly consider documents on which a plaintiff's complaint necessarily relies and whose authenticity is not contested); *In re Century 21-Re/Max Real Estate Adver. Claims Litig.*, 882 F. Supp. 915, 921 (C.D. Cal. 1994) (applying same reasoning to 12(c) motion on the pleadings).

Judgment on the pleadings is proper where, as here, claims are preempted, barred by statutes of limitations, or foreclosed by failure to allege either sufficient facts or a cognizable legal theory. *See, e.g.*, *Elliot v. Fortis Benefits Ins. Co.*, 337 F.3d 1138, 1141-42, 1147 (9th Cir. 2003) (affirming district court's grant of judgment on the pleadings where state claims were preempted by federal law); *Underwood Cotton Co. v. Hyundai Merchant Marine (Am.), Inc.*, 288 F.3d 405, 407, 411 (9th Cir. 2002) (affirming district court's grant of judgment on the pleadings where statute of limitations barred the claim); *Geraci v. Homestreet Bank*, 347 F.3d 749, 752 (9th Cir. 2003) (affirming district court's grant of judgment on the pleadings where plaintiffs "could not state facts to establish a violation").

ARGUMENT

I. THE FAAAA PREEMPTS PLAINTIFF'S COMPLAINT EXCEPT FOR A ROUTINE BREACH OF CONTRACT CLAIM.

A. The FAAAA Broadly Preempts Claims That Relate To UPS's Prices Or Services.

Through the express preemption provisions of the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), Congress has barred any state from "*enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service*" of any motor carrier, air carrier, or intermodal air/ground carrier with respect to the transportation of property. 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A) (emphasis added). An identically-worded provision prohibits states from enacting or enforcing a "law, regulation, or other provision having the force and effect of law" related to a "price, route, or service of" a motor carrier affiliated with an air carrier. *See* 49 U.S.C. § 41713(b)(4)(A). Each of these provisions applies to UPS, which uses both ground and air transportation. *See, e.g., W. Parcel Express v. United Parcel Serv., Inc.*, No. C 96-1526 CAL, 1996 U.S. Dist. LEXIS 18138 (N.D. Cal. Dec. 3, 1996), *aff'd on other grounds,* 190 F.3d 974 (9th Cir. 1999).

The FAAAA preemption provisions were enacted to eliminate a "patchwork" of state regulation that had created "a huge problem for national and regional carriers attempting to conduct a standard way of doing business"; through preemption, Congress intended that "[s]ervice options will be dictated by the marketplace," rather than through the diverse laws and

policies of the fifty states. H.R. Conf. Rep. No. 103-677, at 87-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759-60; *accord Kelley v. United States*, 69 F.3d 1503, 1508 (10th Cir. 1995) (FAAAA preemption "clearly serves to eliminate the 'patchwork' of varying state regulations that concerned Congress"). To achieve this goal, Congress expressly incorporated "the broad preemption interpretation adopted by the United States Supreme Court in *Morales v. Trans World Airlines*, *Inc.,* 504 U.S. [374 (1992)]." H.R. Conf. Rep. No. 103-677, at 83, *reprinted in* 1994 U.S.C.C.A.N. at 1755. *See also United Parcel Service, Inc. v. Flores-Galarza,* 318 F.3d 323, 335 (1st Cir. 2003) (noting the "broad reach" of the FAAAA preemption provision, and that it is "consistent with the purpose animating the FAA Authorization Act, and Airline Deregulation Act, which sought to prevent states from interfering with the goal of federal deregulation of air transportation by imposing regulations of their own.").

In *Morales*, the Supreme Court interpreted the virtually identical preemption provision contained in the Airline Deregulation Act of 1978 ("ADA"), which preempts states from:

> "enact[ing] or enforc[ing] any law, rule, regulation, standard, or other provision . . . *relating to rates, routes, or services* of any air carrier . . . ."

Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992) (quoting former 49 U.S.C. § 1305(a)(1)) (emphasis added).[4] The specific issue in *Morales* was whether state consumer protection laws could be used to enforce National Association of Attorneys General guidelines concerning advertising of airline fares. The Supreme Court concluded that any such action was preempted because state regulations restricting fare advertisements have an "express reference to fares" and plainly "'relate to' airline rates." *Id.* at 388. *See also id*. at 383 (the statutory language "express[es] a broad preemptive purpose"). The Court also held that the action was preempted because the proposed restrictions on fare advertising necessarily would have a "forbidden, significant effect upon fares." *Id*. at 388-89.

[4] The current version of the ADA contains identical language: "*related to a price*, route, or *service*" of an air carrier. 49 U.S.C. § 41713(b)(1) (emphasis added).

The Ninth Circuit expressly has recognized that "Congress endorsed the 'broad preemption interpretation' adopted by the Court in *Morales*." *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1188 n.5 (9th Cir. 1998) (citation omitted). It also has recognized that "[t]he phrase 'related to' is interpreted quite broadly: '[a] state or local regulation is related to the price, route, or service of a motor carrier if the regulation has more than an indirect, remote, or tenuous effect on the motor carrier's prices, routes, or services.'" *Indep. Towers of Wash. v. State of Wash.*, 350 F.3d 925, 930 (9th Cir. 2003) (citation omitted). Accordingly, under *Morales*, all state enforcement actions "having a connection with, or reference to, airline 'rates, routes, or services' are pre-empted" by the ADA. 504 U.S. at 384.

B. The *Wolens* Exception Allows Only A Routine Breach Of Contract Claim.

The Supreme Court addressed ADA preemption again in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), reaffirming the broad scope of preemption to hold that state law claims challenging an airline's frequent flyer program under the Illinois Consumer Fraud and Deceptive Business Practices Act were preempted by the ADA. *Id.* at 223-24, 226-28, 234. *Wolens* carved out one narrow exception to ADA preemption, for "routine" breach of contract claims "alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings." *Id.* at 228-29, 232 (internal quotation marks omitted). The Court recognized a "distinction between what the State dictates and what the airline itself undertakes[, which] confines courts, in breach-of-contract actions, to the parties' bargain, *with no enlargement or enhancement based on state laws or policies external to the agreement.*" *Id.* at 233 (emphasis added).[5]

[5] At the same time, however, the Court recognized that "'[s]ome state-law principles of contract law . . . might well be preempted to the extent they seek to effectuate the State's public policies, rather than the intent of the parties.'" *Wolens*, 513 U.S. at 233 n.8 (citation omitted); *see Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1432 n.8 (7th Cir. 1996) (breach of contract claims preempted if they "rely[] on principles of contract law that do not 'seek to effectuate . . . the intent of the parties'") (citation omitted). At this stage of the litigation, it is unclear to what extent Plaintiff might seek to rely on "state laws or policies external to the agreement" to support its contract claim. *Wolens*, 513 U.S. at 233. Accordingly, UPS does not at this time challenge Plaintiff's breach of contract claim as preempted by the FAAAA. Assuming, however, that the breach of contract claim could somehow survive the failure to allege compliance with contractual and statutory conditions precedent (which it cannot,

C. Plaintiff's Claims Fall Within The Scope Of FAAAA Preemption.

As shown above, the FAAAA broadly preempts all state law claims that "relate to" a carrier's "prices" or "services." Plaintiff's claims here do not merely have the prohibited "connection with, or reference to," UPS's prices or services. *See Morales*, 504 U.S. at 384. Plaintiff's state law claims directly challenge UPS prices and services — specifically, UPS's "*service*, for an additional *fee*, of providing delivery confirmation." (Compl. ¶ 14 (emphasis added).)

Indeed, the Complaint is replete with allegations challenging UPS's collection of this additional fee for its delivery confirmation signature service:

- Plaintiff purports to bring this case on behalf of businesses in California that "paid UPS a separate fee for obtaining the signature of the addressee to confirm delivery of packages." (*Id.* ¶¶ 2, 7.)
- Plaintiff alleges that UPS "has charged and continues to charge an additional fee over and above the cost of shipping" and that UPS "consistently charged Plaintiff for providing [delivery confirmation signature] service." (*Id.* ¶¶ 16-17, 19, 43.)
- The Complaint alleges that UPS "failed to establish any system or procedure for assuring that addressee signatures would be obtained" when requested. (*Id.* ¶¶ 20, 25-27.)
- Plaintiff further alleges that UPS has "retained [the additional] fee" even when UPS has allegedly failed to obtain the signature of addressees. (*Id.* ¶ 19.)
- The Complaint alleges that as a result of these charges, UPS is liable to Plaintiff and the purported class for damages, including "the amounts paid by them for the service." (*Id.* ¶¶ 32-33, 36, 45.) Plaintiff also seeks restitution of "all fees paid for the service," injunctive relief, and attorneys' fees. (*Id.* ¶¶ 52-54, 63-69, & p. 15.)

The connection to UPS's prices and services — and the corresponding application of the FAAAA — could not be any more clear or direct. Plaintiff's action makes express "reference to,"

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as discussed below), any effort by Plaintiff to invoke state policies as part of that claim would be preempted and would be challenged at the appropriate time.

and has a "forbidden significant effect" on, UPS's prices. The Complaint directly challenges UPS's practices and manner of providing its delivery confirmation signature service. Indeed, Plaintiff seeks injunctive relief to dictate UPS's delivery services, and specifically to require "that packages shipped on behalf of the Plaintiff and members of the Plaintiff class are personally delivered to and received by the customer." (Compl. ¶ 69.) Accordingly, Plaintiff's action satisfies the test for preemption set forth in *Morales*, 504 U.S. at 388. Plaintiff's claims — directly based on UPS's prices and services — fall squarely within the scope of FAAAA preemption.

D. Plaintiff's Claims And Requested Relief Relying On State Laws And Policies Are Preempted By The FAAAA.

The Supreme Court held in *Wolens* that a claim related to a carrier's price, route, or service can survive preemption only if it is a "routine" breach of contract claim confined "to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." *Wolens*, 513 U.S. at 232-33 (emphasis added). Thus, the only claim that could survive FAAAA preemption is a routine breach of contract claim. Plaintiff's other claims, and its requests for relief beyond compensatory damages available in a routine breach of contract claim, are all preempted by the FAAAA.[6]

1. Plaintiff's Fraud And Negligent Misrepresentation Claims Are Preempted.

Courts consistently hold that the FAAAA preempts tort claims such as fraud and negligent misrepresentation claims where, as here, they relate to a carrier's prices or service. *See, e.g., EIJ, Inc. v. United Parcel Serv., Inc.*, No. CV 03-7301 CBM (JWJx), 2004 U.S. Dist. LEXIS 18481, at *19-21 (C.D. Cal. Sep. 8, 2004) (state law claims for fraud, bad faith, and failure to deliver freight are preempted by the FAAAA because claims "for the alleged nondelivery of shipments" fall "squarely within UPS's services"); *Holmstrom v. United Parcel Serv., Inc.*, No. EDCV 02-00683-VAP (SGLx), 2002 U.S. Dist. LEXIS 26617, at *5 (C.D. Cal. Sep. 18, 2002) (plaintiff's

[6] As discussed in Section III, *infra*, however, Plaintiff's breach of contract claim is defective on other grounds — namely, Plaintiff's failure to allege compliance with contractual and statutory conditions precedent.

claims, "whether sounding in negligence or some other form of tort such as fraud, are barred" by the FAAAA); *In re EVIC Class Action Litig.*, No. M-21-84 (RMB), 2002 U.S. Dist. LEXIS 14049, at *34-36 & nn. 24-25 (S.D.N.Y. July 31, 2002) ("[S]tate causes of action [against UPS] sounding in fraud and misrepresentation are preempted by the FAAAA."); *Rockwell v. United Parcel Serv., Inc.*, No. 2:99-CV-57, 1999 U.S. Dist. LEXIS 22036, at *8 (D. Vt. July 7, 1999) (state tort claims regarding UPS's intake and delivery protocol are preempted by the FAAAA because "[t]ort claims regarding a carrier's shipment of packages 'would affect [its] provision of air shipment services'" (citation omitted)); *Deerskin Trading Post, Inc. v. United Parcel Serv., Inc.*, 972 F. Supp. 665, 672 (N.D. Ga. 1997) (statutory fraud, common law fraud, negligence, and other claims against UPS challenging pricing are preempted by the FAAAA because those claims "impose state laws, standards, and policies external to any agreement between Plaintiff and [UPS]"); *Vieria v. United Parcel Serv., Inc.,* No. C-95-04697 CAL ARB, 1996 U.S. Dist. LEXIS 11223, at *2-3 (N.D. Cal. Aug. 5, 1996) (state law claims for negligence and conversion preempted by FAAAA).

In *In re EVIC*, plaintiffs asserted claims against defendants — including UPS — for breach of contract, unfair competition, conversion, fraud, misrepresentation, and unjust enrichment, and sought to represent a class of shippers who purchased excess value insurance from UPS, alleging that they "relied on UPS's deceptive representations" to purchase the insurance. 2002 U.S. Dist. LEXIS 14049, at *5, 15, 34. The court found that excess value insurance was "related to" UPS's prices and services. *Id.* at *34. It granted UPS's motion to dismiss, holding that plaintiffs' "state causes of action sounding in fraud and misrepresentation" were preempted by the FAAAA. *Id.* at *35-36 & nn. 24-25.

Similarly, in this case, Plaintiff alleges that UPS made misrepresentations to induce Plaintiff and the purported class "to pay extra sums for the services" of personal delivery and recipient signature. (Compl. ¶ 28.) Plaintiff claims that it relied on UPS's alleged misrepresentations and was damaged as a result. (*Id.* ¶¶ 32, 36.) As in *In re EVIC*, UPS's delivery signature service clearly "relate[s] to" UPS's prices and services. Plaintiff's claims are a blatant attempt to use state tort law to hold UPS liable for prices it charged for service it provided.

This is exactly the type of claim that the FAAAA was intended to preclude. Accordingly, Plaintiff's First and Second Causes of Action — for common law and statutory fraud and negligent misrepresentation — are preempted by the FAAAA as a matter of law.

2. Plaintiff's Claims Under California's Unfair Competition Law And False Advertising Act Are Preempted.

In light of the mandate by Congress and the Supreme Court, courts also uniformly hold that state law claims alleging deceptive trade practices or unfair competition are preempted under the FAAAA and the ADA where, as here, they relate to a carrier's prices or services. In *Wolens*, the Supreme Court specifically held that state statutory claims for "[u]nfair methods of competition and unfair or deceptive acts or practices" are preempted by the ADA. *See Wolens*, 513 U.S. at 227 (Illinois Consumer Fraud and Deceptive Business Practices Act "is prescriptive; it controls the primary conduct of those falling within its governance" and therefore is preempted).

This Court similarly has held that the California Unfair Competition Law and California Unfair Practices Act are preempted by the ADA. *See Brownstein v. Am. Airlines*, No. C-05-3435 JCS, 2005 U.S. Dist. LEXIS 30295, at *19 (N.D. Cal. Nov. 7, 2005). In *Brownstein,* the plaintiffs sought to assert claims against an airline for violation of California's unfair competition statutes, Cal. Bus. & Prof. Code § 17200, in addition to other claims, based on their allegation that a large individual occupied a portion of their airline seats, and "American promised something to the plaintiffs and took their money for what it promised; it then failed to deliver what it promised." *Id.* at *18. The Court held that the challenge related to both rates and service, and plaintiffs' claims under state consumer protection statutes were thus preempted by the ADA. *Id.*[7]

[7] Other courts similarly have held state consumer protection law claims to be preempted. *See, e.g., W. Parcel Express*, 1996 U.S. Dist. LEXIS 18138, at *4-5 (claim under California Unfair Practices Act as preempted by FAAAA); *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 931 (5th Cir. 1997) (claim under Texas Deceptive Trade Practice Act preempted by ADA); *Statland v. Am. Airlines, Inc.*, 998 F.2d 539, 541 (7th Cir. 1993) (claim under Illinois Consumer Fraud and Deceptive Practices Act preempted by ADA); *In re JetBlue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299, 315 (E.D.N.Y. 2005) (claim under California Unfair Business Practices act preempted by ADA); *In re EVIC*, 2002 U.S. Dist. LEXIS 14049, at *34-35 (claims under state unfair competition laws and consumer protection statutes preempted by FAAAA);

Here, Plaintiff alleges that "Plaintiff and members of the Plaintiff class paid UPS additional fees for the purpose of obtaining automated confirmation of delivery with the recipient's signature," and that UPS "failed to provide that service for approximately half of orders for which it was requested. . . ." (Compl. ¶¶ 51, 62.) As in *Brownstein,* Plaintiff's claims under California's Business and Professions Code relate to UPS's rates, in that Plaintiff challenges UPS's fees for the delivery signature service, and relate to UPS's service, in that Plaintiff challenges UPS's failure to provide a service. For the same reasons as in *Wolens* and *Brownstein*, Plaintiff's Fourth and Fifth Causes of Action are therefore preempted.

3. Plaintiff's Demands For Equitable Relief, Punitive Damages, And Attorneys' Fees Are Preempted.

Plaintiff's demands for restitution, declaratory and injunctive relief, punitive damages, and attorneys' fees also are preempted by the FAAAA. (Compl. ¶¶ 52-53, 63-64, 65-69, & p. 15.)

In *Wolens*, as discussed above, the Supreme Court held that a claim related to a carrier's price, route, or service can survive preemption only if it is a "routine" breach of contract claim confined "to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." *Wolens*, 513 U.S. at 232-33. *See also Brownstein*, 2005 U.S. Dist. LEXIS 30295, at *17. Courts have uniformly interpreted *Wolens* to limit the remedies available to plaintiff to actual money damages for breach of contract, without further enhancement such as equitable relief, punitive damages, or rescission. *See Barber Auto*, 494 F. Supp. 2d at 1294 (claims for injunctive relief and rescission of contract "preempted by the FAAAA because [they] would constitute an enlargement or enhancement of the parties' bargain"); *Deerskin,* 972 F. Supp. at 673 ("the extraordinary award of injunctive relief would remove a contract claim from the realm of '*routine* breach of contract actions'," therefore, equitable remedies preempted by the FAAAA); *Carsten*, 1996 U.S. Dist. LEXIS 5798, at *12 (price discrimination claim preempted by the FAAAA because plaintiff's "requests for damages

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Carsten v. United Parcel Serv., Inc., No. CIV S-95-862 WBS/JFM, 1996 U.S. Dist. LEXIS 5798, at *11-14 (E.D. Cal. Mar. 20, 1996) (claims under California price discrimination statute preempted by FAAAA); *Fitz-Gerald v. Skywest Airlines, Inc.,* 155 Cal. App. 4th 411, 423 (Cal. App. 2007) (claim under California Unfair Practices Act preempted by ADA).

and injunctive relief . . . are essentially requests that state law be applied to regulate and control the prices that UPS may charge for its services"); *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 609-10 (7th Cir. 2000) (request for punitive damages preempted; "[w]here a claim "is not . . . a request to enforce the parties' bargains" but is instead "a plea for the court to replace those bargains with something else," it is preempted).

In a routine breach of contract action in California, remedies are limited to compensatory damages, that is, the amount that "will compensate the party aggrieved for all the detriment proximately caused [by the breach], or which, in the ordinary course of things, would be likely to result [from such breach]." Cal. Civ. Code § 3300.

In contrast, Plaintiff's request here for equitable relief, including preliminary and permanent injunctive relief, declaratory relief, and an order of restitution, clearly seek an "enlargement or enhancement" of UPS's contractual obligations based on state laws "external to the agreement," and is therefore outside the scope of the *Wolens* exception. Similarly, Plaintiff's demands for attorneys' fees and punitive damages (Compl. ¶¶ 33, 54, 64, & p. 15) are preempted by the FAAAA, because they are not awarded in routine breach of contract actions but, rather, are "the result of California common law." *Power Standards Lab, Inc. v. Fed. Express Corp.*, 127 Cal. App. 4th 1039, 1046-47 (2005) (claims for punitive damages and attorneys' fees preempted by the ADA; punitive damages "are *never* recoverable in routine breach of contract cases" (internal quotation marks and citation omitted)), *cert. denied*, 546 U.S. 1171 (2006). *See also Cates Constr., Inc. v. Talbot Partners*, 21 Cal. 4th 28, 61 (1999) ("In the absence of an independent tort, punitive damages may not be awarded for breach of contract 'even where the defendant's conduct in breaching the contract was wilful [sic], fraudulent, or malicious.'" (citation omitted)).

Thus, federal law preempts Plaintiff's prayer for relief beyond compensatory damages on a breach of contract claim (*see* Compl. at p. 15, ¶¶ 3, 10). Any other relief sought by Plaintiffs is not recoverable as a matter of law.

II. PLAINTIFF'S CLAIMS ACCRUING PRIOR TO JANUARY 27, 2006 ARE TIME-BARRED AS A MATTER OF LAW.

Plaintiff seeks to recover for alleged overcharges over a four-year period, but it did not file this action until July 27, 2007. *See e.g.,* Compl. ¶¶ 15, 19 (alleging UPS charged and collected from Plaintiff the additional fee for each package that was delivered without a signature during a period of four years prior to filing of complaint.) Any claims accruing before January 27, 2006 — 18 months before the action was filed — are time barred and should be dismissed.

The plain language of 49 U.S.C. § 14705(b) bars any civil action to recover overcharges if not commenced within 18 months after the claim accrues. *See* 49 U.S.C. § 14705(b) (a shipper "must begin a civil action to recover overcharges [against a carrier] within 18 months after the claim accrues"). According to the statute, a claim accrues upon delivery or tender of delivery by the carrier. *See* 49 U.S.C. § 14705(g). Thus, courts routinely dismiss overcharge claims when they are filed more than 18 months after the claim accrues.

Recently, the Ninth Circuit confirmed that § 14705 bars breach of contract claims to recover transportation charges that accrued prior to the 18-month limitations period. *See Emmert*, 497 F.3d at 989-90. In *Emmert*, the plaintiff filed an action to recover unpaid transportation charges, and the district court dismissed the claims as time-barred under the 18-month limitations period of § 14705(a), the reciprocal 18-month limitations period applicable to claims by carriers to recover unpaid shipping charges. *Id.* at 985. The Ninth Circuit affirmed the decision of the district court, concluding that "nothing in the text or context of § 14705(a) indicates that the eighteen-month limitations period is restricted to claims seeking charges under a filed tariff, or even to claims arising under federal law." *Id.* at 988. Accordingly, the court held:

> [Plaintiff's] eighteen-month window within which to seek relief had long since closed when it filed its complaint in June 2003, and § 14705(a) necessarily preempts any state law providing for a longer limitations period. . . . We hold that Emmert's first two claims are time-barred under 49 U.S.C. § 14705(a) . . . .

Id. at 989-90.

Similarly, in *Barber Auto*, a class of shippers sued UPS for breach of contract, alleging that UPS overcharged them for shipments based on incorrect package dimensions. *Barber Auto*, 494 F. Supp. 2d at 1291-92. UPS moved for judgment on the pleadings, arguing that the plaintiff's state-law claim for breach of contract was time-barred under § 14705(b) to the extent that it was based on packages delivered more than 18 months before the lawsuit was filed. *Id.* at 1294-95. The court agreed and granted UPS's motion for judgment on the pleadings:

> The plain language of § 14705(b) states that, with respect to claims for overcharges brought against carriers, the individual must begin any civil action within 18 months after the claim accrues. . . . Accordingly, the court finds that the 18 month limitations period set out in § 14705(b) applies to [plaintiff's] state-law breach of contract claim.

Id. at 1295.

These decisions follow a long line of precedent, including from the Supreme Court, in which the courts applied the 18-month bar of § 14705 and its predecessor statute to claims falling outside this time limit. *See, e.g., Kansas City S. Ry. Co. v. Wolf,* 261 U.S. 133, 139-40 (1923) (dismissing civil suit for overcharge as barred by statute of limitations in predecessor statute to § 14705); *In re Apex Express Corp.,* 190 F.3d 624, 642 (4th Cir. 1999) (applying § 14705's predecessor statute to carrier's civil suit against shipper for unpaid freight charges); *Arctic Express, Inc. v. Del Monte Fresh Produce NA, Inc.*, No. C2-06-435, 2007 U.S. Dist. LEXIS 23801, at *16-18 (S.D. Ohio Mar. 30, 2007) (holding that the 18-month statute of limitations in § 14705 applied to a motor carrier's state-law claims seeking recovery against a shipper for unpaid freight charges); *CGH Transport, Inc. v. Quebecor World Logistics, Inc.*, No. 05-209-JBC, 2006 U.S. Dist. LEXIS 22657, at *3-6 (E.D. Ky. Apr. 24, 2006) (rejecting contention that § 14705's 18-month statute of limitations did not apply to state law claims); *see also Carolina Traffic Servs. of Gastonia, Inc. – Pet. for Declaratory Order* ("*CTS*"), No. 41689, 1996 STB LEXIS 189, at *6-7 & n.7 (STB June 7, 1996) (describing § 14705 and its predecessor statute as the "applicable statute of limitations" for civil suits brought by shippers to recover overcharges); *Nat'l Ass'n of Freight Transp. Consultants, Inc. – Pet. for Declaratory Order*, No. 41826, 1997

STB LEXIS 80, at *2, *18 (STB Apr. 21, 1997) ("*NAFTC*") (describing § 14705 as the "statute of limitations on court actions for overcharges").[8]

Here, Plaintiff's claims are similarly barred to the extent Plaintiff seeks to recover for any alleged overcharges outside of the limitations period. Any claims related to a delivery prior to January 27, 2006, therefore, should be dismissed with prejudice, as a matter of law.

III. PLAINTIFF'S FAILURE TO ALLEGE THAT IT NOTIFIED UPS OF DISPUTED INVOICES BARS ANY REMAINING CLAIMS.

As to any remaining claims that are not barred by the statute of limitations, they are subject to dismissal to the extent Plaintiff failed to satisfy its contractual and legal precedents to recovery by giving timely notice.

A. Plaintiff Failed To Allege Satisfaction Of A Contractual Condition Precedent To Recovery.

Plaintiff's failure to satisfy an express contractual condition precedent to recovery warrants dismissal of its claims. The UPS Shipping Contract expressly requires shippers to notify UPS of any disputed shipping charges within 180 days of receiving the invoice. (*See, e.g,* Ex. A at 3.) If the shipper fails to give this notice, its billing dispute is waived. (*Id.* at 3 ("Shippers requesting an invoice adjustment . . . must notify UPS of the request within 180 days of receiving the contested invoice, *or any billing dispute is waived*." (emphasis added).)

Shippers also must plead on the face of any complaint satisfaction and compliance with the notice requirement, or the claim is extinguished. (*See, e.g.,* Ex. A at 4 ("All claims against UPS arising from or related to the provision of services by UPS . . . shall be extinguished unless the shipper . . . pleads on the face of any complaint filed against UPS satisfaction and compliance

[8] Although a judge in the Southern District of New York issued two orders in a single case holding for different and contradictory reasons that §14705(b)'s statute of limitations did not apply to state law claims, the decisions stand alone and were wrongly decided. *Learning Links, Inc. v. UPS of Am., Inc.*, No. 03-7902 (DAB), 2006 U.S. Dist LEXIS 13574 (S.D.N.Y. Mar. 27, 2006) and *Learning Links v. UPS of Am., Inc.*, No. 03-7902, 2006 U.S. Dist. LEXIS 60542 (S.D.N.Y. Aug. 24, 2006). The Ninth Circuit's decision in *Emmert* repudiates the reasoning of the *Learning Links*' decisions. *See Emmert*, 497 F.3d at 988 ("Simply, nothing in the text or context of § 14705(a) indicates that the eighteen-month limitations period is restricted to claims seeking charges under a filed tariff, or even to claims arising under federal law."). *Learning Links* also was expressly rejected in a recent published decision in the Northern District of Alabama. *See Barber Auto*, 494 F. Supp. 2d at 1295.

with those notice and claims periods as a contractual condition precedent to recovery.").) Rule 9(c) of the Federal Rules of Civil Procedure similarly requires the pleading of satisfaction of conditions precedent, and the failure to do so warrants dismissal. Fed. R. Civ. P. 9(c) (a party should "aver generally that all conditions precedent have been performed or have occurred").

Plaintiff's Complaint contains no allegations of having complied with the contract's notice requirements. Plaintiff's claims, therefore, are barred under the very contracts on which it seeks to proceed.

The plaintiff in *Barber Auto*, just as the Plaintiff here, asserted a claim for breach of contract based on UPS's allegedly improper assessment of shipping charges. *Barber Auto*, 494 F. Supp. 2d at 1292. In *Barber Auto*, the court dismissed the plaintiff's breach of contract claim with respect to any alleged breaches for which the plaintiff did not provide notice to UPS of the disputed charges within 180 days of receiving the invoice. *Id.* at 1295-96. Citing prior cases holding similarly, the court ruled:

> Barber does not dispute that contractual conditions precedent such as the 180-day notice provision can be enforced by the court, and other courts have enforced such provisions. *See Williams v. Federal Express Corp.*, [No. 99-06252, 1999 U.S. Dist. LEXIS 22758 (C.D. Cal. Oct. 6, 1999)] (holding that Federal Express was entitled to a judgment as a matter of law on plaintiff's breach of contract claim because of the plaintiff's failure to comply with the contractual notice provision); *Reliance Ins. Co. v. Federal Express Corp.*, No. 84-6498, 1985 WL 2241, *3 (S.D.N.Y. Aug. 1, 1985) (dismissing plaintiffs' claims for failure to comply with contractual notice requirement).

Id. The *Barber Auto* court therefore granted UPS's motion for judgment on the pleadings, holding that because the plaintiff did not give the requisite notice, its claims were barred for failure to meet a contractual condition precedent to recovery. *Id.* at 1296.

Courts in the Ninth Circuit similarly enforce contractual conditions precedent to recovery. *See, e.g., Taisho Marine & Fire Ins. Co., Ltd. v. The Vessel "Gladiolus"*, 762 F.2d 1364, 1368 (9th Cir. 1985) (affirming dismissal of plaintiff's action because plaintiff failed to provide timely written notice of claim as required by the bill of lading); *Williams*, 1999 U.S. Dist. LEXIS 22758, at *3 (granting defendant's motion for judgment on the pleadings on plaintiff's breach of contract claim because plaintiff failed to comply with the contractual notice provision).

Plaintiff seeks to enforce the terms of its contract with UPS, but Plaintiff's failure to comply with the terms of that contract — by failing to give UPS notice of its dispute within 180 days of receipt of each disputed invoice and by failing to plead such notice — bars its claims under that contract. *See Barber Auto*, 494 F. Supp. 2d at 1295-96.

B. Plaintiff Failed To Satisfy A Statutory Condition Precedent To Recovery.

The 180-day notice requirement bar is neither unfair to Plaintiff nor unique to UPS. Federal law similarly imposes a 180-day notice requirement as a precondition to bringing suit for any billing dispute:

> If a shipper seeks to contest the charges originally billed or additional charges subsequently billed, the shipper may request that the [Surface Transportation] Board determine whether the charges billed must be paid. *A shipper must contest the original bill or subsequent bill within 180 days of receipt of the bill in order to have the right to contest such charges.*

49 U.S.C. § 13710(a)(3)(B) (emphasis added). The 180-day notice requirement serves to "facilitate resolution of carrier billing problems" without resort to the courts. *Nat'l Ass'n of Freight Transp. Consultants, Inc. – Pet. for Declaratory Order* ("*NAFTC*"), No. 41826, 1997 STB LEXIS 80, at *4 n.2 (STB Apr. 21, 1997).

Section 13710(a)(3)(B)'s plain language "conditions a shipper's right to challenge a bill on its contesting it within the prescribed time period, without limitation as to the nature of the claim." *Id*. at *13. This notice, which must be in writing, *id*. at *16, is a *prerequisite to filing suit*. *See CTS*, 1996 STB LEXIS 189, at *7-8 ("[P]roviding notice to the other party within the statute's 180-day period is a *precondition for pursuing a claim*, whether the moving party chooses to pursue that claim initially at the Board or *in court*.") (emphasis added). Thus, a shipper "loses any right to contest charges (whether before the [Surface Transportation] Board, in court, or both) if it does not notify the carrier of its disagreement within 180 days of receiving the disputed bill, as required by section 13710(a)(3)(B)." *Id.* at *9.

Accordingly, a plaintiff "must include, as a basic allegation in its complaint, the fact that it contested the charge within 180 days after it received the bill." *NAFTC*, 1997 STB LEXIS 80, at *18; *see also Philips Elecs. N. Am. Corp. – Pet. for Declaratory Order,* No. 42013, 2000 STB

LEXIS 253, at *20 (STB May 5, 2000) (dismissing carrier's claims for additional charges because carrier failed to comply with the 180-day rule). Because Plaintiff does not allege that it complied with the statutory notice requirement, its breach of contract claim fails for this reason also.

CONCLUSION

UPS is entitled to judgment as a matter of law on the grounds that Plaintiff's claims are preempted by the FAAAA, barred by the 18-month statute of limitations that federal law imposes on claims against package carriers for alleged overcharges, and barred by Plaintiff's failure to fulfill or allege contractual and statutory conditions precedent to recovery. Accordingly, UPS respectfully requests this Court to enter judgment in its favor as a matter of law.

Dated: November 9, 2007

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